COURT OF APPEALS
DECISION
DATED AND RELEASED

April 15, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1640-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

State of Wisconsin,

Plaintiff-Respondent,

v.

Steven T. Miller,

Defendant-Appellant,

Freddie Lee Wright,

Defendant.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Steven T. Miller, *pro se*, appeals from the trial court's order denying his motion to modify his sentence. He argues that the trial court erred in sentencing

him to consecutive sentences and in requiring that he pay up to twenty-five percent of his prison income for restitution. We affirm.

Miller pled no contest to charges of auto theft, party to the crime, and first-degree recklessly endangering safety. On November 18, 1994, the trial court sentenced Miller to two concurrent five-year sentences, "consecutive to any other time being served." As a result, Miller will serve his concurrent five-year sentences consecutive to a twenty-year sentence following a probation revocation for an unrelated crime.

Miller argues that his five-year concurrent sentences could not be consecutive to his twenty-year sentence after revocation because, at the time of sentencing in the instant case, he had not yet begun serving the previously-imposed sentence and did not begin doing so until February 9, 1995 when, he says, he began serving his sentence by entering the Dodge Correctional Institution. Miller is incorrect.

In the first place, as Miller acknowledges, his probation was revoked on November 1, 1994, before his November 18 sentencing in this case. Thus, he was serving his sentence after revocation regardless of whether he was incarcerated at Dodge or some other institution while he awaited sentencing for the subsequent offenses. *See* ***State v. Beets***, 124 Wis.2d 372, 377-78, 369 N.W.2d 382, 384-85 (1985) (once probationer has been revoked, he or she is deemed to be serving the previously-imposed sentence).

In the second place, § 973.15(2)(a), STATS., provides that a trial court "may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously." Thus, regardless of whether Miller had begun serving his twenty-year sentence, that sentence had been "imposed ... previously" and, therefore, the trial court had the authority to order that the concurrent five-year sentences be consecutive to the previous sentence. Indeed, as the Legislature explained, the statute "allows sentences to be made

consecutive to any previously or simultaneously imposed sentence, without regard to whether the offender is 'then serving' such sentence" and, further, that the statute was revised precisely because its predecessor had "failed to achieve its apparent purpose of allowing consecutive sentencing in situations involving probation and parole revocations."[1] Judicial Council Committee Note, 1981, § 973.15, STATS.

Miller also argues that the trial court erred in requiring that up to twenty-five percent of his prison income be assigned for payment of restitution. We disagree. Section 973.20(1), STATS., (1993-94), in part, provides: "When imposing sentence ... for any crime, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution ... unless the court finds substantial reason not to do so...." Section 973.20(10), STATS., explicitly anticipates that among the defendants ordered to pay restitution will be those who are "sentenced to imprisonment" and, further, § 973.20(11)(b), STATS., requires the corrections department to "establish a separate account for each person in its custody ... ordered to make restitution for the collection and disbursement of funds." We conclude, therefore, that the trial court had authority to order that up to twenty-five percent of Miller's prison earnings go toward his required restitution.[2]

By the Court.—Order affirmed.

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[1] Miller also argues that the trial court's sentencing pronouncement was ambiguous. Although, as the State concedes, the "pronouncement ... could be clearer," it unambiguously ordered that the concurrent five-year terms be consecutive to any other sentence.

[2] Miller also argues that the trial court ordered restitution "without taking into account his ability to pay" and, in his reply brief he argues, for the first time, that the restitution order "most assuredly adds an increased hardship." Miller does not, however, offer anything to refute the trial court's statement, in the order denying his postconviction motion, that "[t]he restitution question was addressed in the court's August 31, 1995 decision and order and will not be revisited." Thus, the State argues, "the only restitution issue before this court is Miller's claim that the court had no authority to order that up to 25% of this prison wages be deducted to meet his restitution obligations." Although we have located nothing in the record reflecting an August 31, 1995 decision and order, Miller has not disputed its existence.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.